In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

CLARENCE DEVEUVE, doing business under the firm name and style of San Francisco Underwriters of San Francisco, THE TEXAS NATIONAL INSURANCE COMPANY OF DOVER, DELAWARE (a corporation), and THE SECURITY NATIONAL FIRE INSURANCE COMPANY OF GALVESTON, TEXAS (a corporation),

Petitioners and Appellees,

vs.

IDA LOUISE TARLETON and MARY ANN MCELLIGOTT,

Respondents and Appellants.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals appears in 113 F. (2d) 240, and in the record herein

at R. 256-282 inclusive; the District Court minute orders for the entry of a judgment for the defendants appear in the record at page 61 (as number 1501-R) and the findings of fact and conclusions of law appear at pages 61 to 69 inclusive and the judgment of the District Court appears at pages 70 and 71 of the record.

II.

JURISDICTION.

A.

The date of the judgment to be reviewed is July 3, 1940.

Petition for rehearing was filed on August 2, 1940, within the time allowed by rule of Court and was denied by the Circuit Court of Appeals for the Ninth Circuit on September 11, 1940. (Record, page 282.)

B.

The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, 239 and 240, 28 U. S. C. A. 346, 347.

C.

The cases believed to sustain said jurisdiction are as follows:

Bradford Electric Light Co. v. Clapper, 284 U. S. 221, 76 L. ed. 254, 52 S. Ct. 118;

Slaker v. O'Connor, 278 U. S. 188, 73 L. ed. 258, 49 S. Ct. 158.

D.

FACTS SHOWING THAT THE NATURE OF THE CASE AND THE RULINGS BELOW WERE SUCH AS TO BRING THE CASE WITHIN THE JURISDICTIONAL LIMITS RELIED UPON.

a.

The trial Court found as a fact that the policy was not in effect at the time of the loss—delivery not made and premium not paid. (Record, pages 67, 68, Findings of Fact, par. XIII.)

This finding is supported by the evidence.

1. After the policy was issued by the San Francisco underwriters, and sent to McGlone, the Sacramento broker, through whom the policy was secured for the insured, he did not contact Mrs. McElligott for the purpose of telling her that it had been issued. He went out to see her several times but she was sick or wasn't around. (Record, page 118.)

2. After issuance of the policy on March 5, 1936, and prior to May 2, 1936 (the date upon which the policy was returned to the company accompanied by a letter stating that it was to be canceled because the insured could not pay the premium—Exhibit A introduced in evidence at Record, page 115), he did not make demand upon Mrs. McElligott for the payment of this premium of $200. (Record, page 113.)

3. Although he went several times to make a demand for premium, but couldn't see her. (Record, page 113.)

4. He did not notify Mrs. Tarleton, even try to find her address, where she lived or where she could be contacted. (Record, pages 116-129.)

5. Mr. Ulvilla, from whom he received the policy, kept dunning McGlone for the payment of the premium. (Record, page 210.) On May 2, 1936, McGlone returned the policy of insurance to the company accompanied by a letter stating that the insured could not pay the premium so he returned it to them for cancellation. (Letter dated May 2, 1936, introduced in evidence, Record, page 115.)

b.

When there is no payment on a premium and no delivery of the policy, a contract of insurance cannot arise.

The findings of fact and conclusions of law of the trial Court should not be set aside "unless clearly erroneous"—due regard being given to the opportunity of the trial Court to judge of the credibility of witnesses. (Rule 52 of Rules of Procedure of the District Court of the United States adopted by the United States Supreme Court, subdivisions (a) and (b) thereof.) "Since findings were supported by the evidence, they should stand and the decision of the Circuit Court of Appeals of the Ninth Circuit, reversing the United States District Court was error.

c.

The United States Circuit Court of Appeals for the Ninth Circuit held that the following questions were before the Court:

1. Whether the insurance policy was ever in effect;

2. If so, whether it was incumbent upon appellees as required in the mortgage clause attached to and

made a part of the policy, to have given Mrs. Tarleton, mortgagee, 10 days notice before canceling;

3. Whether the action of McGlone in returning to appellees the policy, accompanied by a request to cancel it, sufficed to deprive Mrs. McElligott of any rights thereunder.

It is submitted that under Rule 52, subdivisions (a) and (b), supra, the only question before the Court was whether findings were supported by the evidence and should stand or were "clearly erroneous" due regard being given to the opportunity of the trial Court to determine the credibility of witnesses, and should be set aside.

The decision of the Circuit Court of Appeals for the Ninth Circuit reversing the United States District Court (trial Court) raises the question as to the scope of review permitted or required by the United States Appellate Court pursuant to Rule 52 of the Rules of Civil Procedure for the District Courts of the United States. It is submitted that Rule 52 is not unambiguous; that the decisions construing Rule 52 do not follow any definite trend. The elucidation of its own rules is an indispensable aspect to the United States Supreme Court. There is a definite need for an authoritative and elucidating decision of the Supreme Court of the United States interpreting Rule 52 which is of public importance to the Courts as well as to the legal profession.

d.

The United States Circuit Court of Appeals for the Ninth Circuit did not follow the rule laid down

in *Cities Service Oil Company v. Dunlap,* 308 U. S. 208, in applying and interpreting the California law as to the presumptions and burden of proof. California Code of Civil Procedure, Sections 1869, 1981, 2061(5).

e.

The United States Circuit Court of Appeals for the Ninth Circuit did not follow the rule of *Erie v. Tompkins,* 304 U. S. 64, in that it failed to apply and to interpret the decision of the California case of *Ferrar v. Western Assurance Corporation,* 30 Cal. App. 489, to the facts in the case at bar.

f.

The cases believed to sustain said jurisdiction are as follows:

Erie v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188;

Cities Service Oil Co. v. Dunlap, 308 U. S. 208, 60 Sup. Ct. 201, 84 L. Ed. 196;

Pennsylvania Railroad Co. v. S. Chamberlain, 228 U. S. 333-9.

Rules of Court relied upon believed to sustain jurisdiction:

Rule 52, subdivisions (a) and (b) of the Rules of Procedure of the District Courts adopted by the Supreme Court of the United States.

California statutes relied upon believed to sustain jurisdiction:

California Code of Civil Procedure, Sections 1869, 1981, 2061 (5).

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition under paragraph B, pages 4 to 6, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

The Court erred in holding as follows:

1. In reversing the judgment of the trial Court by setting aside the findings of fact and conclusions of law in the absence of any showing that they were "clearly erroneous".

2. In failing to interpret and in failing to apply the provisions of Rule 52 of the Rules of Civil Procedure adopted for the District Courts of the United States by the Supreme Court of the United States.

3. In failing to interpret and failing to apply the rule in *Erie v. Tompkins,* 304 U. S. 64, as applied to the rule in *Ferrar v. Western Assurance Corporation,* 30 Cal. App. 489.

4. In failing to interpret and failing to apply the rule in *Cities Service Oil Co. v. Dunlap,* 308 U. S. 208, as applied to presumptions and burden of proof in accordance with California Code of Civil Procedure, Sections 1869, 1981, 2061 (5) and interpretations and construction thereof in compliance with the laws of the State of California.

5. In deciding an important question of federal law in a way which is in conflict with the decisions of the United States Supreme Court, the decisions of other United States Circuit Courts of Appeal and the decisions of its own Court or Circuit (U. S. Circuit Court of Appeals, 9th Circuit) on the same subject.

POINT A.

THE FINDING OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION THEREOF, ARE SUPPORTED BY THE EVIDENCE AND SHOULD NOT BE SET ASIDE BECAUSE THEY ARE NOT "CLEARLY ERRONEOUS", AND DUE CREDIT SHOULD BE GIVEN TO THE OPPORTUNITY OF THE TRIAL COURT TO JUDGE THE CREDIBILITY OF WITNESSES.

Rule 52 provides as follows:

"(a) EFFECT. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judg-

ment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

The trial Court found as a fact that the fire insurance policy sued upon was not in effect at the date of the claimed fire loss. It also found that the policy had not been delivered to or accepted by appellants or their agents—the premium had not been paid—and that the policy was in the possession of the defendant insurance companies at the time of the claimed loss on May 21, 1936—having been returned to them for cancellation on or about May 2, 1936, because the insured, Mary Ann McElligott, could not pay the premium on the policy. (See Findings, par. 13, pages 67 and 68.) That said fire insurance policy was received by the defendants on May 4, 1936, and the policy was cancelled flat as requested.

After the policy was sent out of the San Francisco Underwriters' office in San Francisco, to Mr. Ulvilla, it remained in possession of W. D. McGlone, the insurance broker in Sacramento, who acted for McElligott in securing the policy, until May 2, 1936. The policy had never been in possession of Mrs.

McElligott (Record, page 118) nor had it ever been in the possession of Mrs. Tarleton, the mortgagee. (Record, page 167.) We particularly direct the Court's attention to the testimony of Mr. McGlone on page 118 of the record. He was asked this question:

> "Q. After the policy was issued by the San Francisco Underwriters, did you contact Mrs. McElligott for the purpose of telling her that it had been issued?
>
> A. I went out to see her several times but she was sick or wasn't around."

No demand had been made upon her for the payment of the premium prior to the time that the policy had been returned to the defendant insurance companies on May 2, 1936 (Record, page 113):

> "Q. Did you after the issuance of this policy on March 5, 1936, and prior to May 2, 1936, ever make a demand upon Mrs. McElligott for the payment of this premium of $200?
>
> A. I went out to see her to make a demand but I couldn't see her."

While on page 115, he makes the same answer.

> "Q. You say, Mr. McGlone, that you didn't have a conversation with Mrs. McElligott about her inability to pay the premium by reason of sickness in her family.
>
> A. Yes, sir."

He didn't contact Mrs. Tarleton and ask her to pay the premium (Record, page 116):

> "Q. You never contacted Mrs. Tarleton and asked her to pay the premium, did you?
>
> A. No, sir."

and on page 129, Record:

"Q. Did you notify Mrs. Tarleton?
A. No, sir.
Q. Try to find her address?
A. No, sir.
Q. Where she lived?
A. No, sir.
Q. Where she could be contacted?
A. No, sir."

After the policy was mailed to McGlone, Mr. Ulvilla demanded payment of the premium and sent a bill for the premium with the policy (Record, page 210):

"Q. And then after this was mailed to Mr. McGlone, did you demand payment of the premium and send a bill for the premium for the policy?

A. Yes, we did, we dunned Mr. McGlone for the premium upon the request of the company."

On May 2, 1936, McGlone sent a letter to the defendant insurance companies introduced in evidence as Exhibit A at Record, page 115, addressed to Mr. Ulvilla at the Lumberman's Underwriting Alliance stating "I am returning the above captioned policy for cancellation. Due to sickness in the family, the insured cannot meet the premium at this time. I am Sincerely Yours, W. G. McGlone." It was in response to the dunning of Mr. Ulvilla as indicated by the questions and answers given in the Record, page 210, that Mr. McGlone on May 2, 1936, wrote the letter to the company returning the policy.

Between March 5, 1936, the date of the issuance of the policy, and May 2, 1936, the date upon which it

was returned, Mr. McGlone asked the insurance company to cancel the policy flat (Record, page 144):

> "Q. In the meanwhile, you asked the company to cancel the policy flat.
>
> A. Previous to that letter, yes. (Referring to the letter, Exhibit A, introduced in evidence at page 115 of the record in which he states that the policy is being returned for cancellation because the insured cannot pay the premium at this time.)"

The defendant insurance companies acted upon the request of Mr. McGlone to cancel the insurance policy flat because the insured could not pay the premium and so advised him that the policy had been returned to them about the first part of May, 1936, cancelled flat and marked "Not taken", when he attempted to make claim under the policy. (Record, page 177.)

It is respectfully submitted that under the circumstances there is only one possible conclusion that can be drawn from the evidence and that is that the policy, although issued, had never been in fact delivered to either Mrs. McElligott, the owner of the property insured, or Mrs. Tarleton, the mortgagee, and under the circumstances, the contract of insurance did not arise.

It has been held that: "There has been no payment of the premium and no delivery of the policy. There is a strong presumption that there is no contract and no intention to contract except by payment of premium and delivery of the policy." *Equitable Life Insurance Society v. McElroy,* 83 F. Rep. 631, 49 U. S. App. 548, 28 C. C. A. 365; *Union Central Life*

Insurance Company v. Pauloy, 8 Ind. App. 85, 35 N. E. Rep. 190.

It is respectfully submitted that the findings are not only supported by the evidence but on the other hand, they are not "clearly erroneous" and therefore they should not be set aside.

POINT B.

The Circuit Court of Appeals for the Ninth Circuit did not decide that the findings were "clearly erroneous". The Court did not make any mention of Rule 52, subdivisions (a) and (b), but on the contrary held that the following questions were before the Court to-wit:

1. Whether the policy was in effect.
2. Whether it was ever cancelled as to appellant and respondent, Tarleton.
3. Whether it was ever cancelled as to appellant and respondent, McElligott.

It is respectfully submitted that none of these questions were before the Court unless they first determined that the findings were "clearly erroneous", after giving due regard to the opportunity of the trial court to judge of the credibility of the witnesses. Then, and only then, did they have a right to examine the evidence and draw conclusions opposite to those drawn by the trial Court.

We have demonstrated under Point A, above, that those findings are supported by the evidence. We

refer to them here for further particulars and it is respectfully submitted that no reasonable man could draw any conclusion other than the one drawn by the trial Court, to-wit: that the policy was not in effect and neither appellant and respondent McElligott nor appellant and respondent Tarleton acquired any rights thereunder.

POINT C.

THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT REVERSING THE JUDGMENT OF THE TRIAL COURT (U. S. DISTRICT COURT FOR NORTHERN CALIFORNIA, NORTHERN DIVISION THEREOF) IS IN CONFLICT WITH THE DECISIONS OF ITS OWN CIRCUIT, OTHER UNITED STATES CIRCUIT COURTS OF APPEAL AND THE SUPREME COURT OF THE UNITED STATES ON THE SAME SUBJECT.

The United States Circuit Court of Appeals by reversing the judgment of the United States District Court for Northern California, Northern Division thereof and setting aside the findings of fact and conclusions of law of the trial Court to which we have referred in Point A above, and from the same facts from which the trial Court deduced that the policy had never been in effect because it had never been accepted, had never been delivered, the premium had not been paid and that it was returned to the company for "flat" cancellation prior to the date of the loss and was in fact cancelled "flat" by the company, and arriving at an opposite conclusion that the policy was in effect at the time of the loss, had never been cancelled as to the mortgagee, Ida Louise Tarleton, in

accordance with the terms of the policy or by mutual consent and that further it had not been cancelled as to appellant and respondent, Mary Ann McElligott, either in accordance with the terms of the policy or by mutual consent or agreement between the parties and in further holding that McGlone, under the circumstances, had no authority to return the policy for cancellation, exceeded its jurisdiction because the United States Circuit Court of Appeals for the Ninth Circuit has no such power as it has undertaken to exercise in arriving at this decision, and weighing the evidence. In doing so, the United States Circuit Court of Appeals for the Ninth Circuit has attempted to and has in fact weighed the evidence, a power which, according to its own decisions, the Court does not possess.

Anglo-California National Bank v. Lazard, 106 F. (2d) 693.

It was therein held:

"That the weight to be given the evidence was for the trial Court and not for this Court."

Occidental Life Insurance Co. v. Thomas, 107 F. (2d) 876.

Held:

"It was for the trial court to determine whether the weight of the evidence was for the appellant or the appellee or whether the evidence gave equal support to each of two inconsistent inferences within the rule announced in Pennsylvania Railroad Co. v. Chamberlain, 228 U. S. 333 at page 339."

The Court further laid down the rule that:

"Questions as to the weight of evidence are not to be decided by us."

The decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case at bar is therefore in conflict with the decisions of its own Circuit as shown by the holdings of the two cases of the United States Circuit Court of Appeals for the Ninth Circuit. The decision is also in conflict with the decision of the other United States Circuit Courts of Appeals on the same subjects.

I. The decisions of the Fourth Circuit have three times held that Rule 52 "is but the formulation of a rule long recognized and applied by Courts of Equity".

Guilford Construction Company v. Biggs, 102 F. (2d) 46;

Stonega Coke and Coal Company v. Price, 102 F. (2d) 411;

United States v. Appalachian Power Company, 107 F. (2d) 769.

Under the old equity practice, the findings of the trial Court were not binding upon the Circuit Courts of Appeal. The Fourth Circuit indicates that Rule 52 of the new Rules of Procedure for United States Districts Courts is "but the formulation of a rule long recognized and applied by Courts in Equity", and they, in effect, hold that the findings of the trial Court are not binding upon the Circuit Courts of Appeal. In other words, the United States Circuit Court of

Appeals of the Fourth Circuit holds that it has a right to weigh the evidence. It is pointed out above that the *Circuit Court of Appeals for the Ninth Circuit has twice held,*

Anglo-California National Bank v. Lazard, 106 F. (2d) 693;

Occidental Life Insurance Co. v. Thomas, 107 F. (2d) 876,

that questions as to the weight of evidence are not before the Court.

The above decisions of the Ninth Circuit are at variance with those of the Fourth Circuit. The decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case at bar in effect holds that findings of the trial Court (U. S. District Court) are not binding upon the United States Circuit Court of Appeals for the Ninth Circuit and is therefore at variance with the decision of its own Court as indicated by the two cases cited supra.

II. The First Circuit seems to have given Rule 52 a similar interpretation to the Fourth Circuit in a case not decided under the new rule. (*Malloy v. New York Life Insurance Company,* 103 F. (2d) 439.) (The case was reversed on other grounds.) But in the same circuit, in the case of *Manning v. Gagne,* 108 F. (2d) 718, C. C. A. 1st 1939, the Court held: "The question is not 'was there substantial evidence to warrant the findings different from those made—but only whether they are clearly erroneous'." In this respect the First Circuit seems to agree with the

Fourth Circuit as to the binding effect of the findings of the United States District Court.

III. In the Eighth Circuit, one decision while not directly applying Rule 52, identifies the rule with the former rule in law cases—that there is no reversal unless findings of the trial Court were unsupported by the evidence.

Luzier's Inc. v. Nee, 106 F. (2d) 130 (C. C. A. 8th 1939).

In the same circuit (Circuit Court of Appeals of the Eighth Circuit) in another case, *Storley v. Armour & Co.,* 107 F. (2d) 499, the Court holds:

"it is not the function of this Court to retry this case and to pass upon questions of fact, the determination of which depends upon the credibility of witnesses and the weight of evidence or to substitute its judgment for that of the trier of facts which had reached permissible conclusions."

IV. The decisions of the Fifth and the Seventh Circuits are equivocal.

(a) FIFTH CIRCUIT:

McKeever v. Fontenot, 104 F. (2d) 326.

The appellants asked for a review of the evidence upon which the findings were based.

Held: They are not entitled to a review if the evidence supports the findings.

Sundt v. Turman Oil Company, 107 F. (2d) 762, C. C. A. 5th, 1939.

Held: Findings will not be disturbed on appeal if they are supported by the evidence.

(b) SEVENTH CIRCUIT:

McDaniel v. United States, 108 F. (2d) 450, C. C. A. 7th, 1939.

Held: Where the evidence is conflicting, the trial findings are persuasive, presumptively correct, but not conclusive, but should not be set aside unless clearly erroneous.

V. The decisions in the Fifth and Seventh Circuits in the cases cited above are at variance with the decisions of the Ninth Circuit.

Judge Haney of the Ninth Circuit, one of the judges who sat in the case at bar, in a concurring opinion, in the case of *Occidental Life Insurance Co. v. Thomas,* 107 F. (2d) 876, stated "That questions as to weight of evidence are not to be decided by us." And findings are "clearly erroneous" if no reasonable man could logically draw such conclusions from the evidence. While this seems an accurate statement of the former rule as to cases in law, an earlier concurring opinion of Judge Haney seems to regard Rule 52 (a) as different than the law rule (*Anglo-California National Bank v. Lazard,* 106 F. (2d) 693, C. C. A. 9th, 1939), while in an earlier case decided by Judge Haney to-wit:

Crowell v. Baker Oil Tools Inc., 99 F. (2d) 524, page 577, C. C. A. 9th, 1938,

he held, "Although appellant's testimony supports his contention, Mellin's testimony is contrary". In view of the conflict, we believe that the trial Court made no "serious important mistake" and that its findings were not "clearly erroneous". (Citing Rule 52, subdivision (a).)

It is submitted that the above cases demonstrate a definite conflict of decisions between the various Circuit Courts themselves as well as the Ninth Circuit on the same subject in the case at bar and also a definite conflict and variance with its own decisions of the same Circuit on the same subject.

POINT D.

THE PLAINTIFFS AND APPELLANTS HAVE NOT SUSTAINED THE BURDEN OF PROOF REQUIRED UNDER CALIFORNIA LAW AND THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT REVERSING THE TRIAL COURT FAILED TO INTERPRET AND FAILED TO APPLY THE RULE OF CITIES SERVICE OIL CO. v. DUNLAP, 308 U. S. 208 AND FAILED TO FOLLOW THE CALIFORNIA LAW AS TO THE PRESUMPTIONS AND BURDENS OF PROOF.

California Code of Civil Procedure, Section 1869, provides:

> "AFFIRMATIVE ONLY TO BE PROVED. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party."

California Code of Civil Procedure, Section 1981, provides:

> "EVIDENCE TO BE PRODUCED BY WHOM. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the

burden of proof lies on the party who would be defeated if no evidence were given on either side."

California Code of Civil Procedure, Section 2061 (5), provides:

"5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt;"

Under California Code of Civil Procedure Section 1869, each party must prove his own affirmative allegations. It was therefore incumbent upon the plaintiff to introduce evidence to prove that the policy was in effect at the date of the loss claimed.

Under California Code of Civil Procedure, Section 1981, the party holding the affirmative of the issue, must produce the evidence to prove it and the burden of proof lies upon the party who would be defeated if no evidence be given on either side.

Under the provisions of C. C. P. 2061 (5), in civil cases, the affirmative of the issue must be proved and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence:

Preponderance of the evidence has been construed by the California Courts to mean "such evidence as when weighed with that opposed to it has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests".

See

Lawrence v. Goodwill, 44 Cal. App. 440.

As applied to the facts in the case at bar, it is apparent that the duty was upon the plaintiff to establish the fact of the validity and the existence of the policy by such evidence as when considered with that opposed to it, has more convicing force. It is respectfully submitted that the plaintiffs have not sustained the burden of proof as to the existence of the policy for the reasons hereinafter set forth.

In support of their contention, the plaintiffs, appellants and respondents, introduced the following evidence tending to prove that the fire insurance policy sued upon was in force and effect at the date of the fire loss.

a. The policy of the San Francisco Underwriters with mortgage clause attached, in favor of Ida Louise Tarleton.

b. A letter dated May 22, 1936, written by an agent of the San Francisco Underwriters, Clarence deVeuve, agent of San Francisco Underwriters, addressed to W. G. McGlone, Ochsner Building, Sacramento, California, in which he advises Mr. McGlone the policy sued upon was returned to the office about the 1st of May, canceled flat, "not taken". This evidence coincides with the testimony of McGlone on the stand that between March 5, 1936, the date of issuance of the policy and May 2, 1936, the date upon which it was returned, he requested that the policy be canceled flat. (Record, page 144.)

c. Letter dated May 4, 1936, written on the stationery of the San Francisco Underwriters addressed to J. D. Richards (Record, page 138), which in substance points out that the insured has a right to cancel the policy if she wishes but that if the policy was in effect between March 5, 1936, and May 2, 1936, and a loss occurred, the insured would look to them for payment and requesting Richard to send check for $30 in payment of the premium.

It is respectfully submitted that had a loss occurred between March 5, 1936, the date of the policy and May 2, 1936, the date on which it was returned, nothing is more certain than that Mrs. McElligott and Mrs. Tarleton would claim the policy and the benefits thereunder without even paying the premium. In the event of a loss between March 5, 1936, the date of the policy, and May 2, 1936, the date of the return, the facts might be exactly identical with the case at bar as far as the delivery of the policy is concerned, and in so far as these defendants and appellees are concerned, the difficulty of proving that a valid policy did not exist would be insurmountable. In view of the fact that a fire loss did not occur during this period of time, but after the policy was returned to the insurers through the same channels through which it was received unaccompanied by any offer to pay or agreement to pay any premium, the facts assume different views in so far as proof of existence or non-existence of a valid policy of fire insurance is concerned.

In arriving at its findings of fact that the policy of insurance sued upon was not in force and effect on the date of the fire loss the Court had before it the evidence or testimony of Mr. McGlone, the broker through whom the policy was secured for the benefit of Mrs. McElligott and Mrs. Tarleton as well as the letter of the San Francisco Underwriters to J. D. Richards. It was the duty of the trial Court to construe the letter, to make its own deductions or inferences from the testimony. On the one hand, we have the testimony of Mr. McGlone who states that during the time that he had the policy in his possession, he attempted to but could not see Mrs. McElligott to deliver the policy or to secure the payment of premium. (Record, pages 113-8.) The same was true with respect to Mrs. Tarleton except he made no effort in that regard although her name and address appeared upon the mortgage clause attached to the insurance policy. (Record, page 129.) Those facts took place prior to May 2, 1936, the date upon which McGlone wrote the letter entitled Exhibit A and introduced in evidence at Record, page 115, stating that the insured could not pay the premium so he was returning the policy for cancelation. But the office of the San Francisco Underwriters in San Francisco, is 100 miles away from the office of Mr. McGlone in Sacramento and San Francisco Underwriters had nothing before it from which to determine what in fact Mr. McGlone had done with respect to attempting to deliver the policy to Mrs. Tarleton or to Mrs. McElligott. There are two possible conclusions from the evidence that the San Francisco Underwriters might have arrived

at: That the policy had been delivered to Mrs. McElligott or Mrs. Tarleton or their agents, in which event the policy would be in existence from March 5, 1936, to and including May 2, 1936, and if such was the fact, then a premium would have been earned, and the policy would be canceled at the request of the insured. On the other hand, if the policy had not in fact been delivered to Mrs. McElligott or Mrs. Tarleton, and if Mr. McGlone had attempted to contact them but failed to do so for any reason or failed to secure a promise on the part of either of them for the payment of the premium within the period during which he had the policy in his possession, then it is obvious that there has not in fact been a delivery of the policy and there would be no liability whatever for the payment of premium, and that we submit is the fact in this case. The trial Court had before it the testimony of Mr. McGlone on the stand that he attempted to but could not see Mrs. McElligott, he made no effort whatever to see Mrs. Tarleton, he was dunned for the premium by Ulvilla from whom he received the policy. He returned it to the companies for cancellation having previously requested that the policy be canceled flat, that is, without liability for the payment of a premium. And after considering that evidence, the trial Court found as a fact the policy was not delivered. The trial Court was within its province in weighing this testimony. Inferences and deductions from the evidence which the trial Court drew are those which a reasonable man would draw. The findings are supported by the evidence, "not clearly erroneous" and the Circuit Court of Appeals has no right to set them aside.

The Circuit Court in its opinion refers to this letter at some length. (Record, page 261.) On page 262 they make the following statement: "Approximately a week after the receipt of this communication (referring to the letter of May 4, 1936, hereinabove referred to) McGlone demanded of Mrs. McElligott payment of the $30, without informing her that he had returned the policy for cancellation."

This statement, we submit, contradicts the record. We direct the Court's attention again to the record, page 144, to the testimony of W. V. McGlone, on re-cross examination:

"Q. This last letter here, dated May 4, 1936, addressed to Mr. Richards, to which you have been interrogated, did Mr. Richards send that to you?

A. No.

Q. Where did you get the letter?

A. Mr. Hubbs sent it to me from the Lumberman's Underwriting Alliance—I think Mr. Hubbs.

Q. What did you do when you received it?

A. I didn't do anything.

Q. Did you try to collect it?

A. No, I was waiting for Mr. Hubbs to come in.

Q. In the meanwhile, you asked the company to cancel the policy flat?

A. Previous to that letter, yes.

Q. You didn't call this to Mrs. Tarleton's attention——

A. No, sir.

Q. ——this letter, this demand for payment of premium? And you didn't call it to Mrs. McElligott's attention?

A. No, sir."

Mrs. McElligott's testimony, on the other hand (Record, page 195), is as follows:

"Q. Did Mr. McGlone ever make a demand upon you for the payment of the premium of $30.00 after May 2, 1936, and before May 21, 1936, the time of the fire?

A. Yes."

We respectfully submit that the testimony of Mr. McGlone contradicts that of Mrs. McElligott. The credibility of the witnesses and the weight of their testimony were matters for the trial Court. The trial Court had a right to believe the testimony of McGlone and hold that no demand had ever been made on Mrs. McElligott or Mrs. Tarleton for the premium of $30, and it is submitted that this is exactly what the trial Court did. (Record, pages 222 and 223.) For the convenience of the Court we quote as follows (Record, page 222):

"The Court. If they presented it for $200.00 and didn't receive any * * *"

(Record, page 223):

" 'Cancelled flat' means no earned premium.

The Court. Well, there is no doubt about that.

Mr. Meredith. Well then, that is the point I am making, on May 22, the day after the fire, they said the policy was cancelled flat.

The Court. Yes.

The Court. I am still correct in my deduction, am I not?

Mr. Meredith. You are.

The Court. If not, I will stand corrected, that is all I can say."

It is obvious from the statement of the Court, as well as counsel for Ida Louise Tarleton, appellant-respondent and plaintiff in the case, that they all agreed that it made little difference whether demand was made for $200 or an earned premium of $30, or for any other sum because, as long as that demand was not acceded to and the premium was not paid it did not change the ultimate facts of non-payment. The Court, of course, having in view all the other facts and circumstances in the case and particularly the letter of May 2, 1936, in which McGlone stated that the policy was being returned for cancellation because the insured could not earn the premium and considering testimony (Record, page 144) that between March 5, 1936 and May 22, 1936, he asked that the policy be "cancelled flat", and that the insurance companies cancel the policy flat pursuant of that request as stated in their letter to him of May 22, 1936. The Court had a right to hold as it did that the policy never did come into effect and was not in effect on the date of the loss.

It is respectfully submitted that all these matters were things to be considered by the trial Court. None of them were within the province of the Circuit Court of Appeals, particularly since Mrs. Tarleton stated (Record, page 206) no demand was ever made upon her for the payment of an earned premium of $30. And Mr. McGlone testified, not only once but several times, that he didn't see Mrs. McElligott at any time between the date of the policy, March 5, 1936, and May 2, 1936, the date upon which he returned the policy although he went out to see her several times but could

not do so on account of sickness (Record, page 113), and he didn't demand an earned premium of $30 from Mrs. McElligott. (Record, page 144.)

As a result, the statement of the Circuit Court of Appeals appearing in the opinion that McGlone demanded of Mrs. McElligott the payment of $30 while not informing her that he had returned the policy for cancellation is without foundation in fact unless we disregard entirely the testimony of Mr. McGlone and assume as absolutely true the testimony of Mrs. McElligott and this cannot be done by United States Circuit Court of the Ninth Circuit because due credit must be given to the opportunity of the trial Court to judge of the credibility of the witnesses.

It is respectfully submitted, whether or not the policy was in effect, is a question of fact to be determined by the trial Court. It was obviously written in San Francisco, a distance of some 100 miles from Sacramento, by a person entirely unfamiliar with the facts in the case. There is nothing to indicate that the person writing the letter had any information as to what McGlone did or attempted to do with the policy after he received it, to-wit: that he made no effort whatever to deliver the policy to Mrs. Tarleton, collect the premium from her or to contact her, but on the other hand, having made several efforts between the date on which he received the policy after March 5, 1936, and May 2, 1936, to see Mrs. McElligott, he was unable to do so because she was sick and he was also unable to demand the payment of the premium from her and had not had an opportunity to advise her of the existence of the policy.

Whether or not the policy was in effect or not depends upon the delivery of the policy. McGlone's own effort showed that he did not consider possession of the policy by himself as delivery to Mrs. McElligott, otherwise he would never have attempted to contact her.

(d) Mrs. McElligott did not testify in her own behalf. She was called by the defendants as an adverse witness under Rule 43 (b), and under the provisions of that rule, the defendants are not bound by her testimony, therefore, in so far as Mrs. McElligott is concerned, there is no evidence whatever in support of her allegation. She has definitely failed to sustain the burden of proof and consequently has no rights whatever under the policy.

(e) Mrs. Tarleton knew nothing about the policy. According to Mrs. McElligott's testimony, at no time between March 5, 1936, and May 4, 1936, was she ever contacted by Mrs. Tarleton to the existence or non-existence of the insurance. Mrs. Tarleton, according to her own testimony (Record, page 204) knew nothing whatever of the existence of this policy until some two or three weeks after the loss occurred.

The only person who had any knowledge whatever with respect to this fire insurance policy after it was issued by the San Francisco Underwriters is Mr. McGlone. He received the policy shortly after its date, to-wit: March 5, 1936, and he kept it until May 2, 1936. During that period of time, Ulvilla, of San

Francisco, dunned him for the premium. (Record, page 210.) During the same period of time, he tried to see Mrs. McElligott between March 5, 1936, and May 2, 1936, the date on which he returned the policy but he was unable to on account of her sickness so he returned the policy to the insurance companies through the same channels through which he received it. (Record, page 113.) He made no effort whatever to contact Mrs. Tarleton. (Record, page 129.) At no time did he ever demand an earned premium of $30 from either Tarleton or McElligott or a total premium of $200. (Record, page 144.)

The trial Court found when the evidence of the above was introduced that the policy was not in effect on the date of the fire loss and that neither of the appellants and respondents, Tarleton or McElligott, had any rights under the policy.

The United States Circuit Court of Appeals for the Ninth Circuit arrived at an opposite conclusion based upon the same facts and in so doing made several statements, not at all warranted by the facts which show conclusively that instead of following the findings of fact made by the trial Court, with due credit being given to the opportunity of the trial Court to judge of the credibility of witnesses, they, themselves, weighed the evidence in arriving at their conclusions which resulted in a decision reversing the judgment of the trial Court.

We have already pointed out that Mrs. McElligott did not take the stand on her own behalf and that she was however, called as an adverse witness by the de-

fendants pursuant to Rule 43 of the Rules of Procedure of the United States District Court adopted by the Supreme Court of the United States which in substance provides that an adverse party may be called as a witness, be cross-examined under oath, and the parties so calling the witness are not bound by his or her testimony. Her statement as to what occurred with respect to the fire insurance policy is entirely at variance with the testimony of Mr. McGlone. Mrs. McElligott's testimony cannot be reconciled with the testimony of Mr. McGlone in several particulars, to-wit:

1. According to Mrs. McElligott, she did not say she could not pay the premium. (Record, page 196.)

2. Mr. McGlone testified that when he received the policy, he attempted to contact Mrs. McElligott (Record, pages 113-118) and was advised that she was ill, and he was unable to see her.

3. It must be presumed in view of his testimony that McGlone kept the policy in his possession from March 5, 1936, to May 2, 1936, solely for the purpose of attempting to deliver the policy, to collect from Mrs. McElligott the premium, and to make the remittance of the premium to the insurance company involved; that he did not intend to deliver the policy to Mrs. McElligott unless she paid the premium. He would not be warranted in doing anything else because she had already demonstrated when he secured the first policy for her, that she was unable to pay the premium and he was obligated to cancel it during the month of December, 1935.

The testimony of McGlone being wholly irreconcilable with the testimony of Mrs. McElligott, they both cannot be true. If McGlone told the truth in his testimony, the appellants had no case whatever. The veracity of Mrs. McElligott, as well as the veracity of Mr. McGlone, is to be judged by their manner on the witness stand and by their actions as well as by the atmosphere of the entire transaction none of which can be reproduced in a record for the Circuit Court of the United States, written or otherwise printed.

Only where there is no evidence whatever to support the findings of the trial Court should this judgment be set aside. It is respectfully submitted that in accordance with the provisions of Rule 52 of the Rules of Procedure for the United States District Courts, there is nothing in this record to justify a finding by the United States Circuit Court of Appeals, either that there was no evidence to support the findings or that the findings were "clearly erroneous" and should be set aside. It is respectfully submitted that the only conclusion that could be deduced from the facts in evidence here is that the policy did not go into effect at all. No one could say that no reasonable man could draw such a conclusion as the trial Court did. And in the language of Judge Haney of the United States Circuit Court of Appeals of the Ninth Circuit who sat in this case as appears in the case of *Occidental Life Insurance Company v. Thomas* (supra) the findings are clearly erroneous only if no reasonable man could draw such conclusions. If any reasonable man could draw such conclusions, the findings should therefore stand.

The Court, in its opinion, makes several statements which are not all in accordance with the facts unless they select isolated portions of the testimony and give it full credibility, while at the same time totally disregarding all other evidence in the record which tends to contradict it but does in fact contradict it.

I. (Record, page 258.) Hubbs then sent in the application to A. J. Ulvilla, his superior, who in turn contacted John D. Richards, a general insurance broker in San Francisco.

This would seem to indicate that McGlone placed a formal application for insurance with Mr. Ulvilla, Special Agent for the Lumberman's Underwriting Alliance. This is contradicted by the record. McGlone, in his testimony stated (Record, pages 99-100), he asked Hubbs to help him place the insurance. Hubbs told him he could not place it in his own company but he would attempt to place it elsewhere for him. No one at that time knew of the company in which it was to be placed and they had already attempted to place it in several companies without success. Consequently an application was not being made to the San Francisco Underwriters by McGlone, Hubbs, Ulvilla or by any person else. Their intention seemed to be to contact some insurance company which would be willing to offer to insure the property under conditions to be thereafter agreed upon.

II. Approximately a week after the receipt of this communication which Richards forwarded to him, McGlone demanded of Mrs. McElligott the payment of $30 without informing her that he had returned the policy for cancellation. (Record, page 262.)

This statement entirely contradicts the testimony of Mr. McGlone which states that he never demanded payment of an earned premium from Mrs. Tarleton or Mrs. McElligott.

"Q. This last letter here, dated May 4, 1936, addressed to Mr. Richards on which you have been interrogated, did Mr. Richards send that to you?

A. No.

Q. Where did you get the letter?

A. Mr. Hubbs sent it to me for the Lumberman's Underwriting Alliance—I think Mr. Hubbs.

Q. What did you do when you received it?

A. I didn't do anything.

Q. Did you try to collect it?

A. No, I was waiting for Mr. Hubbs to come in.

Q. Meanwhile, you asked the company to cancel the policy flat?

A. Previous to that letter, yes.

Q. Previous to the letter you did nothing about this? Did you ever call it to Mrs. McElligott's attention?

A. No, sir.

Q. You didn't call this to Mrs. Tarleton's attention——

A. No, sir.

Q. ——this letter, this demand for payment of premium? And you didn't call it to Mrs. McElligott's attention?

A. No, sir."

Mrs. McElligott's testimony, on the other hand, was exactly the opposite (Record, page 195), and is in line with United States Circuit Court of Appeals for the Ninth Circuit language appearing in Record, page 262.

"Q. Did Mr. McGlone ever make a demand upon you for the payment of premium of $30 after May 2, 1936, and before May 21, 1936, the time of fire?

A. Yes."

It is respectfully submitted that both of these statements cannot be true and the truth of the one which is accepted as a fact, cannot depend on anything else except the credibility of the witness involved. The trial Court has the best opportunity of judging this credibility and under the circumstances, it is beyond the province of the Circuit Court of Appeals for the Ninth Circuit, to say that the testimony of Mr. McGlone is false and that of Mrs. McElligott is true because that Court is required, under the provisions of Rule 52 hereinabove referred to to give due regard to the opportunity of the trial Court to judge of the credibility of witnesses and if it fails to do so, it violates the plain provisions of that rule.

III. The Court makes a further statement. (Record, page 258.)

The record does not reveal what arrangements Richards made with them for the payment of the premium.

It is submitted that Mr. Richards appeared as a witness during the course of the trial and it is clear by inference that neither Mr. Richards or the San Francisco Underwriters, or Mr. Ulvilla intended to permit Mr. McGlone, or appellant and respondent, Tarleton, to have possession of this policy without the payment of premium. This is shown by the fact that Mr.

Ulvilla (Record, page 210) continued at the request of the insurance company to dun Mr. McGlone for the premium on the policy between its date, March 5, 1936, and the date on which it was returned, May 2, 1936. That McGlone (Record, page 144), previously, during this period of time, had requested that the policy be cancelled flat. It is apparent that the dunning by Mr. Ulvilla, of Mr. McGlone, for either the policy or the premium, brought the policy back to the insurance company through the same channels through which it was received. It is obvious from the record as a whole that the insurance company did not intend this policy should ever be in effect unless the premium on it was paid even though the possession of it might temporarily be in the hands of Mr. McGlone, and it is shown by the records this possession was for the purpose of delivery and not otherwise, and Mr. McGlone, as shown by his actions, understood it.

The record further shows that no money was ever paid to either of the defendant insurance companies, either directly or indirectly. (Record, page 202.) Mrs. Tarleton testified that between the date of the mortgage, April 24, 1936, and the time of the fire loss, May 21, 1936, she never made any inquiries of Mrs. McElligott as to the existence or the non-existence of the policy. In the preliminary statement of facts in connection with the case under "History and Pleadings", we have set forth six separate defenses, most of which were based upon the testimony of Mr. McGlone, as shown by a deposition taken in August, 1937, which was at total variance with his testimony in many re-

spects when he took the stand during the course of the trial.

At the taking of his deposition in August, 1937, he stated in substance, that after he received the policy, he had an agreement with McElligott that she would pay the premium within sixty days from the date of the policy. For the convenience of the Court we quote as follows (Record, page .....):

"Q. And what arrangements if any did you make with her about the payment of the premium?

A. Well, she should pay the money when it was due.

Q. When was it due?

A. Well, on this last one it would be due sixty days or a little better than sixty days.

Q. Sixty days from what? After the date of the issuance of the policy?

A. Yes.

Q. You were asked those questions, and did you give those answers?

A. Yes, sir."

This is at total variance with the testimony which he gave during the trial. He stated (1) that between March 5 and May 2, 1936, he attempted to but could not contact Mrs. McElligott; (2) that at the taking of his deposition in August, 1937, he stated that he didn't recall whether or not the policy was in his possession while the deposition shows that on August 31, 1938, he corrected the record to show that he kept the policy in his possession.

It is obvious that these two contradictory statements made by McGlone, to-wit:

In the taking of his deposition in August, 1937:

1. That after he received the insurance policy sued upon he had an agreement with Mrs. McElligott whereby she would pay the premium within sixty days from the date of the policy, that is, sixty days after March 5, 1936 (before May 4th).

And his testimony upon trial:

2. That between the date on which he received the policy, to-wit: March 5, 1936, and the date upon which he returned it to the companies, May 2, 1936, accompanied by a letter stating that he returned it because the insured was ill and could not pay the premium at that time (Record, page 115) and also his further statement that between March 5, 1936, and May 2, 1936, he asked that the policy be canceled flat (Record, page 144) cannot be true.

The meaning of his testimony must be construed by the trial Court which has before it these contradictory statements above pointed out. The trial Court might assume, for the purpose of argument without admitting it, that McGlone did in fact contact Mrs. McElligott and make an agreement with her whereby she was to pay the premium within sixty days. Under those circumstances, it is obvious that McGlone did not intend to deliver the policy until he received the payment of premium, and when he did not receive the premium in accordance with this agreement, within sixty days, he refused delivery of the policy to her. On the other hand, the Court could assume from the nature of the two statements which are contradictory of each other, that the greater probability of the truth

lay in the fact that he attempted to but did not see Mrs. McElligott because she was sick (Record, page 113) and made no attempt whatever to contact Mrs. Tarleton (Record, page 129) because this coincides with the letter which he wrote to the San Francisco Underwriters on May 2, 1936, stating that the insured could not pay the premium, and the Court would therefore construe that the policy had not in fact been delivered, or accepted by the plaintiffs, appellants and respondents, or either of them, and hence the policy did not come into effect at all.

Here again, we are confronted with the credibility of the testimony of McGlone on the witness stand, as opposed to the testimony which he gave upon his deposition in 1937. This is a matter within the exclusive province of the trial Court and not within the province of the United States Circuit Court of Appeals. The veracity of McGlone is so far to be judged by his manner on the witness stand and by his actions as well as the atmosphere of the entire transaction, none of which can be reproduced in a record for the Circuit Court of Appeals, either written or printed, that only where there is no evidence whatever to support the findings of the trial Court that the policy did not come into existence should the findings of the trial Court be set aside.

It is respectfully submitted that in accordance with Section 52 of the Rules of Civil Procedure for the United States District Courts, there is nothing in the record to justify a finding by the United States Circuit Court of Appeals that there was no evidence to sup-

port the findings of the trial Court and that the policy did not come into effect and that it had not been delivered to or accepted by either of the plaintiffs, appellants or respondents. The findings of the trial Court in this regard were "not clearly erroneous" and should not be set aside. Even if we assume that the delivery of the policy might be a question upon which reasonable men might reasonably differ, we submit that there is nothing unreasonable in the deduction of the trial Court that the policy did not in fact come into existence at all and that there was no liability under the policy in so far as the defendants, appellees and petitioners are concerned.

The insurance companies are in an unusual position as far as the insurance policy is concerned. They received the policy back on May 2, 1936, within 60 days after its issuance through the same channels through which it was sent to Mr. McGlone, accompanied by a letter signed by McGlone, agent for McElligott, stating that it was returned for cancellation and that the premium could not be paid on account of illness. The insurance companies have no way of determining what in fact did happen to the policy after it had been sent to McGlone, and they were justified in believing as they did that this was a request for cancellation by the insured.

The defendants, in their answer, have set up six separate defenses. (Record, pages 50-58, inclusive.) The first defense is based upon the theory that the premium was to be paid within sixty days and if not paid, the policy would be surrendered and cancelled.

This was based upon the testimony of Mr. McGlone taken at his deposition, August, 1937, which he did not sign until August, 1938. The second defense is based upon a request for cancellation by the insured prior to loss. This defense is based upon the letter dated May 2, 1936, returning the policy and advising the companies that the insured could not pay the premium and it was therefore cancelled. The third defense was the same in substance as the second defense and likewise the fourth. The fifth defense is based upon the invalidity of the policy according to the terms by reason of false representations, etc. The sixth defense is based upon the theory that the premium was payable on demand, that demand was made and the premium was not paid. The policy was surrendered by the insured to the insurance companies. This latter defense is likewise based upon the communication from McGlone.

The above defenses were pleaded on the basis of information in possession of the appellees and petitioners herein at the time that the answer was filed on or about July 20, 1937. The deposition was taken on August 7, 1937, and signed and sworn to on August 14, 1938, about thirteen months after the defendants had filed their answer in the case.

Mr. McGlone was questioned with respect to statements that he made on the taking of his deposition in August, 1937, which contradicted statements which he made on the stand at the trial, and they are so widely divergent that both of them cannot be true. Upon the taking of his deposition in August, 1937, he stated that

he did not remember whether the policy was in Mrs. McElligott's possession but when he corrected it in August, 1938, he stated that it was always in his possession. When his deposition was taken, he stated that he had an agreement with her that she would pay the premium within 60 days from the date of the policy (about May 2, 1936, the date on which the policy was returned to the insurance companies) while upon trial, he stated that he never attempted to contact Mrs. Tarleton but he did attempt to contact Mrs. McElligott to deliver the policy but could not do so because she was ill and he further stated, in language which could not possibly be misunderstood, as follows (Record, page 113):

> "Q. And did you after the issuance of this policy on March 5, 1936, and prior to, say, May 2, 1936, ever make a demand upon Mrs. McElligott for the payment of this premium of $200.00?
>
> A. I went out to see her to make a demand, but I couldn't see her."

The facts with reference to the policy are in the possession of McGlone and the appellees have no way of telling what that information may be except through his deposition prior to trial and from his testimony taken during the course of the trial.

It is an impossibility to believe these contradictory statements. They must be construed, in connection with all the surrounding circumstances and particularly the documentary evidence, evidenced by the letter referred to as Exhibit A (Record, page 115) which most closely coincides with his testimony during

the trial. It will be borne in mind that he was confronted with this letter for the first time at the trial and that fact alone probably explains the diversity in his testimony taken on his deposition in August, 1937. The letter of May 2, 1937, cannot be explained rationally on any other theory than, that McGlone did either one of two things: Either the policy was offered to Mrs. McElligott and she refused to accept it or he attempted to deliver it to her and could not contact her because of her illness or that he refused to deliver it because she couldn't pay the premium and his prior experiences indicated that she was a bad credit risk and unless the premium was paid, he himself would be responsible for the premium.

Inconsistent defenses may be pleaded under the new rules. At the time that the answer was filed and the deposition from Mr. McGlone was signed, appellees had no reason to believe that this would not be the testimony of Mr. McGlone on trial. However, when he was confronted with his own handwriting showing that he returned the policy to the insurers because the insured could not pay the premium, he took a different stand entirely. He testified as we have indicated throughout the brief, showing by his testimony that he never did make an attempt to deliver the policy to Mrs. Tarleton but on the other hand he attempted on several occasions to see her and to talk with her but was unable to do so each time that he called at her place of business. It is submitted that Mr. McGlone never did intend to deliver the policy unless the premium was paid and if such was the fact, possession by him was not delivery to Mrs. McElligott or to Mrs.

Tarleton. On the other hand, if he attempted to deliver the policy to them, but was unsuccessful, then the policy never did come into effect and on either theory of the facts, there would be no liability under the policy because the policy did not come into being.

POINT E.

THE UNITED STATES CIRCUIT COURT OF APPEALS DID NOT INTERPRET AND DID NOT APPLY THE RULE IN FERRAR v. WEST ASSURANCE CORPORATION, 30 CAL. APP. 489, TO THE FACTS IN THE CASE AT BAR.

In the *Ferrar* case, supra, the assured instructed her agent to take care of her insurance and to see that she was kept covered. The agent handled her affairs in respect to several insurance transactions. The agent thereafter accepted notice of cancellation from one company and procured new insurance, with the defendant companies. The question arose as to whether this prior policy was not still in force therefore invalidating defendants' policy, the defendant companies contending that the assured's agent had no authority to receive notice of cancellation of the prior policy. The Court held in that case that the agent had authority to receive notice of cancellation of the prior policy (p. 491):

> "Perhaps when Coleman (the agent) placed the first insurance for Mrs. Plier (the assured), he was merely an insurance solicitor, whose authority was quite limited, but later, as we have seen, she extended his authority by telling him 'to take care of her insurance and to see that she was covered to the amount of $1000'."

And the Court concluded (p. 492):

"Coleman's testimony we think tends to co roborate the testimony of Mrs. Plier; but we a satisfied that the direction by Mrs. Plier to Col man just referred to made him more than a me soliciting insurance agent, and constituted him, found by the Court, her general agent to keep h insured to the extent of one thousand dollars i respect to the property here involved. Being h general agent for this purpose we think he wa authorized as an incident of his employment t accept and to act upon a notice of cancelatio (Stevenson v. Sun Insurance Office, 17 Cal. Ap 280 (119 Pac. 529).) 'A general agent with pow to insure property and to keep it insured ma accept notice of cancelation and procure sub stituted insurance or renewal of insurance in a other company.' "

It applies to the case at bar showing that McGlo has power to cancel. Mrs. McElligott first made co tact with Mr. McGlone in August, 1935; he secured policy for her through the Lumberman's. Thereafte she told him to keep her insured in one company another. (Record, pages 194, 195, 118.) Thereafter, h negotiated policies for her with the Kansas City Fi & Marine and Commerce Company, and then starte proceedings with respect to the fourth policy with th appellee companies.

Mrs. McElligott knew of these three transactio and by her instructions to McGlone to keep her i sured gave him authority to cancel as under the pr ceding cases. The fact that McGlone retained th policy in his possession, returned it to the compa

in this case, made an ostensible, if not an actual authority to deal with it in this manner.

On a rehearing of this case, the Supreme Court of California withheld approval of the "ratification language in the case as unnecessary to the decision because the Appellate Court directly held that the agent in the case had authority to cancel.

The case of *Kooistra v. Rockford Insurance Company,* ..... Mich. ....., 81 N. W. 568, is a case on "all fours" with the case at bar, with respect to the authority of an agent to cancel. In that case, the agent of the assured received the policy and then received notice of the cancellation and returned the policy. Thereafter, this performance was repeated with respect to three other policies, and in case the agent accepted notice of cancellation and returned the policy. The assured never had possession of the policies yet instructed the agent to keep trying to get insurance until he found some company who would carry it. The Court held that the agent had authority to cancel, accept notice of cancellation, accept five days' notice required by the policy if surrendered, the Court said:

> "The four policies had been issued, surrendered and canceled while they were in the agent's possession. Can plaintiff have her choice as to which one of these is valid? If the first was valid all others were void, furthermore, she ratified the act of her agent in surrendering the policy upon the furniture secured through Mr. Bodwell. Was Lathrop her agent, could he surrender one policy and not the other, was the policy in the hands of her agent and thus placed it in his hands who

> acted in good faith in canceling the policy. If Mr. Lathrop failed to notify the plaintiff, it is no fault of the defendants. *By leaving the policy with her agent, she placed it in his power to mislead defendants.* If both parties are innocent, it is her act which misled and she must be the sufferer. There is no substantial dispute as to the material facts of the case, therefore, it became a question of law for the Courts and the Courts should direct a verdict for the defendants. Judgment is reversed and in as much no different case can be made upon a new trial, none will be ordered."

A solicitor with authority to effect a particular insurance in the absence of other circumstances does not have implied or expressed authority to cancel or to accept notice of cancellation yet the presence of other circumstances will clothe him with authority. In the cases of *Stevenson v. Southern Insurance Office,* 17 Cal. App. 280, *Ferrar v. Western Assurance Corporation,* 30 Cal. App. 489, and *Kooistra v. Rockford Insurance Company,* ..... Mich. ....., 81 N. W. 568, we find instructions to keep the premises insured and to continue negotiations with several companies and the retention of the policy by the agent and the return to the company showed intention to clothe them with more than bare authority usually present and therefore, an agent in such a case has authority to cancel and to accept notice of cancellation. It is submitted that the conduct of the appellants in the case at bar definitely brings the case within the authority just outlined. The trial Court findings that McGlone had the authority to return the policy for cancellation is supported by the evidence and the law.

The Circuit Court of Appeals for the Ninth Circuit, at page 298 of its opinion, refers to the case of *Kooistra v. Rockford Insurance Company,* indicating that the decisions in the various Courts upon the question as to the authority of an insurance broker to effectuate the cancellation of a policy are not in harmony, and holds that under the doctrine of *Erie v. Tompkins,* they are bound by the California law and then proceed to disregard the rule in *Ferrar v. Western Assurance Corporation* and apply an entirely different rule based upon a dictum appearing in the case of *Laumann v. Springfield Fire Insurance Company,* 184 Cal. App. 650, 652.

It is respectfully submitted that the *Laumann* case does not establish a rule different from the rule in *Ferrar v. Western Assurance Corporation,* because both of these cases are distinguishable on the facts. In the *Laumann* case, Laumann owned the property which was covered by a mortgage to H. R. Dodge in the sum of $1800. The policies of insurance were issued and the mortgage clause was attached as the mortgage clause is attached in the instant case. *The policies were actually delivered and were in effect for several days,* at that time; the insurance company contacted the agent and requested him to cancel the policy. The agent contacted Laumann, the owner of the property, and secured the policies of insurance from him at which time Mr. Laumann agreed that the policies be canceled. No notice whatever was given to the mortgagee, H. R. Dodge. Dodge knew nothing about the transaction and a few days later a loss occurred and the company denied liability. Upon trial,

the Court held that the owner of the property, Laumann, agreed to the cancellation of the fire insurance policy and that Dodge, the mortgagee, had not agreed to it and the policy was still in force and effect as to him. The clause in the policy provided for the method of cancellation, to-wit: by the insured, upon request, or by the company upon notice 5 days to the owner and 10 days to the mortgagee. It could not be canceled in any other way and this is the rule in respect to fire insurance policies generally.

In the instant case, we see an insurance policy that never did go into effect. McGlone had possession of the policy, no attempt to deliver it to Mrs. Tarleton, the mortgagee, several attempts to contact Mrs. McElligott between the date of the policy and the time he returned it, but was unable to do so because he was told that she was sick and he could not secure an agreement from her for the payment of the premium, never called her attention to the fact that he had the policy, and consequently returned the policy to the company through the same channels through which it was received. For that reason, the rule in the *Laumann* case, supra, cannot apply. In addition to that, the other distinguishing feature is that McGlone in this instance dealt with at least three or four companies and was permitted to adopt the same procedure generally. In the instant case, there had been no acceptance of the policy and the policy was not in force and effect. In the *Laumann* case, the policy became effective as a fire insurance contract and it could not be rescinded or canceled except in accordance with the

terms of the contract or by mutual agreement by all parties concerned. The owner only, in the *Laumann* case, agreed to a cancellation and thereby waived compliance with the terms of the policy which gave him the benefit of a five day notice in the event of cancellation by the company. His own testimony indicates that he understood that he waived compliance when he orally agreed with the agent, that the policy was canceled, that the company had no liability on it whatever. The mortgagee is altogether different. The delivery and acceptance of the policy and the fact that it was in full force and effect gave him a vested and absolute right of which he could not be deprived unless the terms of the contract, which so far as he was concerned, were strictly complied with. It is obvious from the facts as they appear in the *Laumann* case, that the policy could be canceled as to the mortgagee, only upon 10 days' notice, and in accordance with the provisions of the policy. This notice was not given and therefore as to the mortgagee, this policy was in full force and effect.

Compared with the case at bar, there is no similarity at all in the facts. The insurance policy had never been in the possession of Mrs. Tarleton or Mrs. McElligott; the Court found as a fact that the policy was not in full force and effect; that there was no delivery of the policy and no contract of insurance was consummated between the parties.

POINT F.

WHAT IS THE SCOPE OF REVIEW OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE TRIAL UNITED STATES DISTRICT COURT BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, PURSUANT TO THE PROVISIONS OF RULE 52 OF THE RULES OF PROCEDURE FOR THE UNITED STATES CIRCUIT COURT ADOPTED BY THE SUPREME COURT OF THE UNITED STATES?

Under the old federal system, that is, before Rule 52 took effect, there was a statute which provided that in cases tried where a jury has been waived by agreement, the findings of the Court should have the effect of a verdict. (U. S. C., Title 2, Sec. 773.) That meant that they could not be set aside there or on review if there was any substantial evidence to support them. On the other hand, where you had the same judge trying the case without a jury and findings of fact, the equity rule was that the findings were not binding upon the United States Circuit Courts of Appeal.

Now under Rule 52, we have united the law and equity in a common procedure. We could not say "well, this is an old equity case and therefore the findings should be governed by this rule" or "it is an old law case cognizable at law under the old system". The enabling act contemplates uniformity, having the same system and it is obvious to anyone that the question as to the weight to be given to a judge's findings does not depend upon whether or not it was once a law case or once an equity case. The weight of the findings depends upon the way the findings are made and in both cases whether it was originally a law case or originally an equity case; the judge is the one who hears the evidence and makes the findings.

The advisory committee was of the opinion that the same weight should be given to both classes of findings. We could not perpetuate the difference between actions at law and suits in equity and therefore we must adopt one rule common to both types of cases where the judge tries the facts. And that puts the advisory committee to the choice of whether they should adopt the equity rule or the law rule or whether they should narrow the exent to which the equity findings previously were examined, or enlarge the extent to which the findings in law cases tried by a judge without a jury should be examined.

The advisory committee was in agreement as to the limitation of review to be provided for in issues tried by the Court without a jury. Dean Clark (now Circuit Judge in the Second Circuit) advocated an extension of the law type of review to Courts' findings of fact.

Clarke & Stone, Review of Findings of Fact (1937), 4 Chi. U. L. Rev. 190, 191, 192.

The majority of the committee favored the extension of the equity rule to all issues tried by the Court.

(Note of Supreme Court following proposed Rule 68, preliminary draft, 1936.)

Instead of submitting alternative rules and permitting the Supreme Court to make its own choice which was done in other instances, the equity form—"Findings of the Court in such cases shall have the same effect as that heretofore given findings in suits in equity" was advocated.

(Proposed Rule 65, preliminary draft, 1936.)

Transmitting the first public draft of the rules to the Supreme Court, the chairman of the committee stated that it was obvious that the law type of review must be rejected.

(Preliminary Draft, 1936, XIV.)

Its rejection was not treated as obvious in the notes of the Supreme Court following proposed Rule 68. *The rule was changed in the second published draft.*

(Proposed Rule 59, Report of the Advisory Committee, 1937.)

The language of the second draft in so far as it pertains to the scope of review of the facts, is the same as in Rule 52 and adopted by the Supreme Court which provides:

"Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses."

It has been assumed in some of the decisions of the United States Circuit Court that Rule 52 provides for the equity of review. *But it is submitted that the scope of review called for by this rule is an open question for the Supreme Court to settle* for not only has the expressed equity characterization been deleted in favor of language which, although found in modern federal equity cases, seems to be an accurate statement of the effect to be given jury verdicts.

Clarke & Stone, Review of Findings of Fact (1937), 4 Chi. Un. L. Rev. 190 at page 210, note a.

But also the committee notes state *not that Rule 52 "adopts"* the equity rule, but merely that it is in *"accord"* with the modern federal equity practice.

If the traditional concept of a review of the findings at law is applied under Rule 52, the burden on the Appellate Court will be lightened; particularly is it desirable that the Supreme Court be freed from analyzing confused and conflicting testimony and passing upon the weight of evidence. It is submitted that the United States Supreme Court should find Rule 52 ambiguous and resolve the question in favor of the common law rule rather than in favor of the former equity rule.

In paragraph A of this brief above, we have pointed out by reference to specific cases, that the various Circuit Courts of the United States are not in harmony as to the scope of review under this rule, the Fourth Circuit having three times ruled that it is "the formulation of a rule long recognized and applied by the Courts of equity" while the First Circuit identifies Rule 52 with the former rule in law cases and a later decision in the Eighth Circuit states that it is not the function of the Court to retry the case and to pass upon questions of fact, the determination of which depended upon the credibility of witnesses and the weight of evidence or to substitute its judgment for that of prior facts which had reached permissible conclusions. The decisions of the Fifth and Seventh Circuits are in disagreement among themselves and with each other, as indicated by the cases cited, supra. The United States Circuit Court of Appeals for the

Ninth Circuit has twice held that questions as to the weight of evidence are not to be decided by them. Judge Haney, a judge who sat in the instant case, has stated that findings are "clearly erroneous only if no reasonable man could logically draw such conclusions from them", while a former decision by Judge Haney indicates that the rule under 52 is different from the old law rule.

Anglo-California National Bank v. Lazard, supra.

If the equity of review is to be followed in all non-jury cases, some disparate results will follow.

A. In actions against the United States, the District Court sits as a Court of Claims without a jury.

J. Homer Fritch, Inc. v. United States, 248 U. S. 458 (1919).

It is provided by statute that the law rule shall apply to review of findings of the Court of Claims.

Act of May 22, 1938, amending 28 U. S. C. 288b. Formerly review was limited to questions of law alone.

B. The scope of review in cases brought in the District Courts is unsettled.

1. Earlier cases assume that the law rule applies.

Lee Hardware Co. v. United States, 25 F. (2d) 42 (C. C. A. 8th, 1928);

Wessel v. United States, 49 F. (2d) 137 (C. C. A. 8th, 1931).

2. But a recent decision applying the full review of equity to such a case was denied certiorari by the Supreme Court.

First National Bank of Chicago v. United States, 102 F. (2d) 907 (C. C. A. 7th, 1939), certiorari denied, 307 U. S. 641 (1939), rehearing denied, 60 Sup. Ct. 69 (1939).

If Rule 52 adopts the equity of review, this case is a correct statement of the present law, but the result will be a different scope of review depending upon whether the plaintiff goes into the District Court or the Court of Claims.

A similar result may follow in similar cases in which the party has an option to proceed before the Board of Tax Appeals or bring the suit in the District Court.

26 *U. S. C.* 641C (1934);

Helvering v. Johnson, 104 F. (2d) 140 (C. C. A. 8th, 1939);

Holds: "Findings of the Board of Tax Appeals are conclusive if supported by substantial evidence."

THE BACKGROUND FOR PROPER REVIEW.

A continuation of the old distinction between law and equity is undesirable because it requires the upper Court to make a distinction which it is the main purpose of the new reform to avoid. The extension of the equity review appeals to those who feel that a second

review by an Appellate Court of more than one judge is necessary for the proper control of the trial Court's action.

OUR HISTORY INDICATES THAT THE RIGHT OF APPEAL SHOULD BE RESTRICTED

(a) For the purpose of protecting from a plethora of cases, our important Federal Appellate Courts, particularly the United States Supreme Court through a reduction of the number of appeals, the record in those cases where appeals are lost.

(b) Because the trial judge's reaction to witnesses is on the whole more dependable than those to be obtained, only from the printed record. This feeling has definitely resulted in a restriction of the equity review.

AN EXTENSION OF THE SCOPE OF REVIEW IS NOT DESIRABLE

(a) Because it is not in keeping with our history.

(b) It would present definite problems of conflict as to other important federal cases, notably claims against the United States, claims for tax refunds before the Board of Tax Appeals which will definitely result in a different type of review depending upon whether the party seeking relief elects to proceed in the United States District

Court or to file the claim in the Court of Claims or before the Board of Tax Appeals.

(c) It would continue a divided practice upon appeal and would prevent the simplicity and uniformity of one single, concrete rule.

In conclusion, bearing in mind the advantages, simplicity and uniformity, compatible with other federal jurisdiction; reducing appeals and complex records; giving due weight to the findings of the trial judge who heard the witnesses; eliminating reversals except on substantial ground while nevertheless supporting substantial grounds to correct errors where necessary, it is submitted there are very substantial reasons why the law type of review should be extended to all types of cases alike.

If the decision of the United States District Court is subject to full review while the Board of Tax Appeals or the Court of Claims has a limited law review, there is an incentive to jockeying for position in these cases and the development of clear-cut and certain rules of substantive law upon which business men may rely is impeded.

We submit that the "Law Rule of Review" which prevents setting aside findings on appeal unless they are unsupported by the evidence, should be applied in all cases whether arising in the District Court, the Court of Claims or before the Board of Tax Appeals, because it will establish uniformity of procedure and reduce the burden on appellate judges.

CONCLUSION.

The only guide that the United States Circuit Courts of Appeal for the various Circuits has for reviewing the findings of the trial Court is afforded by the Rules of Procedure for United States District Court adopted by the United States Supreme Court, themselves, and the interpretation of those rules by the United States Supreme Court and other Circuit Courts of Appeal of competent jurisdiction.

If the rule laid down here is permitted to stand, to-wit: that the findings of the trial Court are not binding upon the Circuit Court of Appeals, then the decision in this case undermines the whole purpose of the Rules of Procedure, to-wit: uniformity. This decision will be the basis for providing a different scope of review depending upon whether the case is initiated in the United States District Court or the Court of Claims or before the Board of Tax Appeals. The decision in the case is of great public importance and interest not only to the Courts but to the legal profession as well.

If allowed to stand as the law, it will permit conflicts in decisions in the various United States Circuit Courts to continue and to impair uniformity of decisions where uniformity is significant and this conflict can be removed by the decision of the United States Supreme Court in this particular case.

This Court should declare the law defining the scope of review by an Appellate Court of the findings of the facts and the conclusions of law of the trial Court because the intrinsic importance of the issue

calls for its most authoritative determination, and it is submitted that the Circuit Court of Appeals for the Ninth Circuit has decided an important question of federal law which has not been but should be settled by this Court.

The elucidation and interpretation of the decisions of the United States Circuit Court of Appeals for the Ninth Circuit has failed to interpret and failed to apply to the facts in the case at bar, the decisions of the United States Supreme Court in the cases of *Erie v. Tompkins,* supra, *Cities Service Oil Company v. Dunlap,* supra, and *Pennsylvania Railroad Company v. Chamberlain,* supra.

We respectfully submit that for the reasons stated, the petition for the writ of certiorari filed herein should be granted.

Dated, Sacramento, California,
November 8, 1940.

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